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| STATE OF WYOMING |) | IN THE DISTRICT COURT FOR THE |
| |) ss. | SECOND JUDICIAL DISTRICT |
| COUNTY OF ALBANY |) | |
| LEE PUBLICATIONS, INC., |) | |
| APG MEDIA OF THE ROCKIES, LLC, |) | |
| and WYOFIELD, |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| vs. |) | Docket No. _____ |
| |) | |
| UNIVERSITY OF WYOMING, and |) | |
| UNIVERSITY OF WYOMING BOARD |) | |
| of TRUSTEES, as Custodians of the Records, |) | |
| |) | |
| Respondents. |) | |

PETITION FOR ACCESS TO RECORDS

Petitioners Lee Publications, Inc., APG Media of the Rockies, LLC, and WyoFile, acting by and through their attorney, petitions the Court, pursuant to Wyoming Public Records Act, specifically Wyo.Stat. § 16-4-203(f), for access to records. In support of their Petition, Petitioners state as follows:

PARTIES AND JURISDICTION

1. Petitioner Lee Publications, Inc., a Delaware corporation authorized to do business in Wyoming, publishes *The Casper Star-Tribune*, a newspaper of general circulation in Casper, Natrona County, Wyoming.

2. APG Media of the Rockies, LLC, is the publisher of sister newspapers, the

Laramie Boomerang in the home city of the University of Wyoming, and *Wyoming Tribune-Eagle*, a newspaper of general circulation in Laramie County, Wyoming, both of which have covered the demotion of University President Laurie Nichols and seek the same records that are the subject of this action.

3. WyoFile, is a domestic non-profit organization supported by its members dedicated to public interest news service reporting on the people, places and policy of Wyoming. WyoFile has requested records related to President Nichols' demotion. WyoFile would officially request the records sought here if the University had not declared the records to be confidential under law and exempt from public disclosure.

4. The University of Wyoming (University) is the lone publicly-funded university in the state and is an agency of the State of Wyoming for the purposes of the Wyoming Public Records Act. It is governed by its Board of Trustees. The University of Wyoming and its Board of Trustees are the custodians of the records sought to be released to the public in this matter. A governmental entity or official is the custodian if the entity or the official has either created the record or received it as part of its official business. *Shaeffer v. University of Wyoming*, 2006 WY 99.

THE LAW

5. The records sought in this action are public records as defined by Wyo.Stat. §16-4-201(v) of the Wyoming Public Records Act.

6. Wyo.Stat. §16-4-203(a) requires that the "custodian of any public records shall allow any person the right of inspection of the records or any portion thereof" unless the records fall within the exemptions set forth in the Act.

7. Any person denied access to public records, regardless of the reason for

requesting the records¹, may apply, pursuant to Wyo.Stat. §16-4-203(f), to the district court of the district wherein the records are found for an order directing the custodians to show cause why they should not permit inspection of the records. While a petition for an order to show cause is not normally used to begin a legal proceeding, it may be so used when authorized by statute, such as the Wyoming Public Records Act. The Court is authorized by the Act to issue the order to show cause *ex parte* and it is then served in the same manner as service of a summons. No answer is required. 56 AM.JUR.2D MOTIONS, RULES AND ORDERS § 46 citing *State Dept. of Revenue v. Succession of Pope*, 579 So.2d 1152 (La. App.2d Cir. 1991); *Flaherty v. Burke*, 515 A.2d 365 (Pa. 1986); *Freedom Colorado Information, Inc. v. El Paso County Sheriff's Department*, 196 P.3d 892, 895-96 (Colo. 2008)(citing C.R.S. 24-72-305(7), which has nearly identical language to Wyo.Stat. §16-4-203(f)).

8. There is an "absolute right to inspect a public document in the absence of *specifically stated sufficient* reasons to the contrary (*emphasis in original*)." *Sheridan Newspapers v. Sheridan*, 660 P.2d 785, 798 (Wyo. 1983). "If, however, the custodian gives either no reasons or inadequate reasons for withdrawal, appropriate legal action is available to force an automatic disclosure of the records." *Id.* at 799.

9. Pursuant to Wyo.Stat. §16-4-203(e), a custodian must state the reasons and cite the statutory authority under which access is denied. The Wyoming Supreme Court has ruled that this provision requires the custodian to provide a document identifying each record, describing the nature of the record withheld, and the reasons and authority for denial. Such

¹ The issue is whether a record is available to the public, and not the reasons why the requester sought the records. *Laramie River Resource Council v. Dinger*, 567 P.2d 731, 733 (1997)("a showing of need is unnecessary to obtain access to public records.").

documents are often referred to as “logs.” *Aland v. Mead*, 2014 WY 83; *Sheridan Newspapers v. Sheridan County School Dist. No. 2*, 2015 WY 70, ¶15 (a case ordering the release of executive session minutes withheld pursuant to a claim of privilege.). In *Aland* at ¶38, the Court ruled: “The custodian must be prepared to provide a written statement of grounds for denial upon request of the applicant, with sufficient information to allow the applicant to evaluate the basis for denial.” The Court cited to *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623, 629 (Nev. 2011)(holding that “a claim that records are confidential can only be tested in a fair and adversarial manner, and in order to truly proceed in such a fashion, a log typically must be provided to the requesting party.”). In the *Sheridan School District* case, the Court held custodians must follow Wyo.R.Civ.P. 26(b)(5), which states that the party withholding a document must describe the nature of the communications that, without revealing the privileged information, will enable the other party to assess the applicability of the privilege.

10. The log is vital to the resolution of this case as the burden is on the respondents to show that each record withheld falls within an exemption to public disclosure.

11. The custodian must provide the information about each record withheld as blanket withdrawal of categories of records are contrary to the Act. *Sheridan Newspapers, Inc.*, 660 P.2d at 795 (1983)(custodian must . . . employ his discretion on a selective basis rather than through the withdrawal of entire categories of public records – as was done by the police chief in this case.”); *see also*, p. 799 (“the action of the chief of police in invoking blanket withholding instead of withdrawal on a case-by-case or record-by-record basis, according to statutory authority, is not shown to be justified.”).

12. If records are provided to one media outlet, then they must be provided to all. Thus, a denial to one requester is a denial to all.

FACTS

13. The University of Wyoming Board of Trustees announced in late March of 2019 that President Laurie Nichols was to be demoted from that position and would serve as a professor at the University during the next school term. No reason was given for the decision to terminate Nichols as president.

14. Nichols and the faculty and staff leaders at the University professed surprise at the decision, and stated they did not know why she was demoted.

15. The *Casper Star-Tribune* requested documents related to any investigation into the performance or conduct of Nichols on April 10, 2019. The University did not acknowledge whether it had such documents, but contended that if such an investigative report did exist, it would be exempt from public disclosure pursuant to the so-called “personnel files” exemption to public disclosure located at Wyo.Stat. §16-4-203(d)(iii). In addition, the University vaguely cited attorney-client privilege as justifying non-disclosure.

16. The newspaper also sought any records setting forth the terms and conditions of employing/retaining an individual and/or entity to conduct an investigation into the conduct or performance of President Nichols, as well as any records related to retaining an investigator. The University denied the request also pursuant to Wyo.Stat. §16-4-203(d)(iii). Upon information and belief, the University hired a third party to investigate President Nichols in response to a complaint.

17. The University refused to provide a list of the records being withheld pursuant to the public records requests. Without such a list, Petitioners are unable to discern whether the particular documents being withheld are subject to either the “personnel files” exemption or attorney-client privilege.

18. Previously, on April 2, 2019, the *Casper Star-Tribune* requested the following:

All public records of communications that include Dave True, Jeffrey Marsh, Kermit Brown and John McKinley that include any of the following keywords: Nichols, Laurie, president, sweep, scrape, renewal, evaluation, Steve Portch, Portch. I am requesting such records that were sent or received between Dec. 1, 2017, up to and including the receipt of this request.

To be clear, I am not seeking public records that contain every keyword or each of the listed individuals. I am seeking any public record that includes any keyword in any document from, to or received by any of the listed individuals.

19. The University estimated it would take 18 hours of professional staff time at \$40 an hour to provide access to the records. The University credited the newspaper for \$180 of the \$720 charge per policy.

20. The University responded on June 6, 2019, providing some of the responsive documents and denying others. It also said that it stopped the process short of providing all of the documents, because time worth \$720 had been reached. The University said it would resume the process once the newspaper paid \$720 for another estimated 18 hours of professional time at \$40 an hour.

21. Of the 18 hours spent on review so far, all but one-half hour was spent by the general counsel's office reviewing and redacting the records that an electronic search revealed. The IT system administrator spent an half hour conducting the search.

LEGAL CLAIM

Investigation Records – Failure to Provide Log

22. Respondents have wrongfully withheld investigative reports into the performance or conduct of President Nichols, as well as records setting forth the terms and conditions of any investigation by a third party into the President's performance.

23. The University has wrongfully withheld the documents, because it failed to

provide a log required by the Wyoming Public Records Act and related case law identifying the nature of each record withheld and the reasons why withdrawal of each record is legally permissible.

24. The Court must order “automatic disclosure of the records” withheld in this matter without the Respondents providing *specifically stated sufficient* reasons justifying withdrawal of each record. *Sheridan Newspapers v. Sheridan*, 660 P.2d 785, 799 (Wyo. 1983).

25. In the alternative, if the Court decides not to order automatic disclosure of the withheld records, then it should order the Respondents to provide the information required by law justifying the withdrawal of each record, submit the disputed records for *in camera* inspection by the Court, then order Respondents to show cause why the records should not be provided, and order those documents that do not fit any exemption released to the public.

Personnel Files Exemption

26. The investigative records also have been wrongfully denied pursuant to the “personnel files” exemption. The appropriate exemption is the more specifically applicable provision at Wyo.Stat. §16-4-203(d)(xi), which exempts records “compiled solely for purposes of investigating violations of, and enforcing, internal personnel rules or personnel policies the disclosure of which would constitute a clearly unwarranted invasion of privacy.”

27. Public access to an investigation into the conduct or performance of the leader of the state’s only university is clearly a matter in which the public has a legitimate interest. Therefore, the exemption does not prevent public access to any investigative report or related documents in this matter.

April 2 Request Denials

28. The University has also withheld the following documents responsive to the April

2, 2019, request by the newspaper:

- 2 communications dated March 23 and 25, 2019, between the President and Board Officers containing information about a staff employee's evaluation pursuant to Wyo.Stat. §16-4-203(d)(iii) ("Personnel files").
- 2 communications dated January 3 and 11, 2019, between the Board Officers containing information about proposed terms of a renewal contract for President Nichols pursuant to Wyo.Stat. §16-4-203(b)(v) (interagency memoranda subject to the deliberative process privilege).
- 21 communications dated January 3 to March 28, 2019, between the Board Officers, the Board of Trustees and General Counsel containing legal advice pursuant to Wyo.Stat. §1-12-101(a)(i) and Wyo.Stat. §16-4-201(a)(v).

The deliberative process privilege allows executives to withhold from the public close, personal advice he or she receives regarding an upcoming decision. *Mead v. Aland*, 2014 WY 83, ¶20.

29. The privilege does not apply as communications among members of a legislative body, such as the University Board, regarding what terms to place in a contract for Nichols. Therefore, the two communications withheld under the privilege must be disclosed to the public.

30. Contary to the requirements of the Act, the denial does not provide sufficient information to determine whether the communications withheld pursuant to attorney-client privilege or under the personnel files fit those privileges.

31. Petitioners ask that the Court order the Respondent to provide a list of the documents withheld, review the withheld documents *in camera* and determine if the documents fit the privilege.

Attorney-Client Privilege

32. Independent investigators are not subject to attorney-client privilege. Further, facts discovered are not covered by the privilege. The privilege does not apply to contracts and other documents setting forth the terms and conditions, as well as payments, to the independent

investigator.

33. Therefore, the University is unlawfully withholding the investigator report and documents setting forth the terms and conditions of retaining the investigator.

Fees For Attorney Review & Redaction

34. Respondents have unlawfully charged for attorney time in reviewing and redacting the records provided. Review and redaction are not reasonable charges as they are part of the duty of the custodian in maintaining public records.

35. Further, reviewing and redacting approximately 10 pages an hour is an unreasonable amount of time to conduct the review and redaction.

PRAYER FOR RELIEF

WHEREFORE, Petitioners request the following relief:

1. An order directing the custodians to automatically disclose the records responsive to Petitioner's request for the investigative report and related documents, including those setting forth the terms and conditions of retaining a firm or person to conduct the investigation that were withheld without sufficient reason.

Or, in the alternative, an order directing the Respondents:

- a) to provide Petitioner with sufficient information as to the specific records withheld, the nature of each record and reasons and authority supporting denial;
- b) to submit the withheld records to the Court for an *in camera* review;
- c) then to appear before the Court to show cause why they should not permit public access to the records requested by Petitioner; and
- d) after the show cause hearing, to make the records requested by Petitioner available for public inspection.

2. An order directing the Respondents to submit the documents withheld pursuant to the April 2, 2019, request for *in camera* review, and, then, issue an order making any response documents not fitting an exemption to be made available to the public.

3. An order declaring the charge for reviewing and redacting the records responsive to the April 2 request as unreasonable pursuant to Wyoming Public Records Act.

4. Other such relief as the Court deems just and proper.

Dated this 20th day of June, 2019.

LEE PUBLICATIONS, INC., APG MEDIA OF
THE ROCKIES, LLC, AND WYOFIL, INC.,
Petitioners

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